APPEAL NO 92112
FILED MAY 4, 1992

On December 23, 1991, a contested case hearing was held in _____, Texas, with (hearing officer) presiding. He determined that the claimant, appellant herein, was injured by a third person for personal reasons and therefore the injury was not compensable under the exception to liability provided in Article 8308-3.02(4) of the Texas Workers' Compensation Act of 1989 (1989 Act), TEX. REV. CIV. STAT. ANN. art 8308-3.02(4) (Vernon Supp. 1992). Appellant asserts that the hearing officer incorrectly applied the law and that the decision is not supported by the evidence.

DECISION

Finding no error in the application of the law and that the decision is not against the great weight and preponderance of the evidence, we affirm.

Appellant was a mechanic qualified to do Class II work as an employee of (employer). He was pushed and struck one blow to the face or head by a fellow mechanic, HS, who was qualified to do only Class III work.

The event took place on September 21, 1991, in the combination toilet and locker room on the premises of the employer. At approximately 1:00 p.m., HS had finished his work, clocked out for the day, and was in the locker changing when appellant entered the locker. Appellant approached HS and inquired if HS had altered a "cartoon" on the shop bulletin board to indicate that appellant was a "crybaby." HS denied doing so to appellant and the hearing officer in his finding of facts found that HS did not amend the cartoon to make it personal to appellant and did not place the offending cartoon on the board. Although there was sufficient evidence to raise the exception to compensability under Article 8308-3.02 (2) (wilful intent to injure), the hearing officer did not make findings or base his decision on that issue. (There was evidence that the appellant entered the locker room where HS was, stated he was going to "whip his Mexican ass," or words to that effect, stepped on HS's clothes, touched his chest to HS's chest--appellant was 6'1," 240 pounds and HS was 5'9," 160 pounds, and held the cartoon up asking if HS had done it--right before the pushing began.)

The record indicates that the cartoon, in its altered state directed at appellant, was based on a perception in the workplace that appellant repeatedly complained to supervisors about other workers' conduct toward him. JL, supervisor at the time to both appellant and HS, said he was not aware of any friction between the two from their work. He characterized neither as a troublemaker but said appellant "had more trouble with different people." He added in regard to appellant:

> He would come in with a different attitude on different days. Some days, you could tease with him and he wouldn't be irritated. The next day if you teased with him, he would come and tell supervision, "Hey, they are pestering me."

The supervisor also discussed the assignment of overtime. In some instances overtime work was considered by employees to be a good thing. Appellant was characterized as very willing to work overtime. Overtime was granted for a variety of reasons and appellant indicated that some employees were unhappy at the amount he did. Nevertheless both the supervisor and HS said that overtime work did not enter into the altercation in question.

There had been complaints by both HS and appellant earlier in the day about each other to the supervisor. The supervisor said that HS complained that appellant was calling him "derogatory names;" supervisor did not say what appellant was complaining about then but said that appellant did not deny calling HS such names. Appellant testified that he had called HS a "Mexican" that morning but said that was the only time he did so; he added that HS called him a "white cracker," and they both went to see the supervisor about that exchange. All agreed that HS and appellant did not work together on the same job but were in separate nearby bays working on different problems.

HS characterized his reason for pushing appellant as fear that appellant was going to hit him. He said after he pushed appellant, appellant came back toward him and so he hit him. (Appellant had said he only came back toward HS to retrieve the cartoon that HS had taken and thrown to the floor). HS said he knew that he had not pursued appellant and then hit him after pushing him away because his pants were still around his ankles since he was dressing.

Appellant argues that Finding of Fact No. 5 and Conclusion of Law No. 3 show as a matter of law that the injury arose out of the employment. Those are quoted as follows:

> 5.Although justified in pursuing complaints according to the Employer's policy, as noted, the Claimant created additional, unnecessary friction by virtue of his tendency to use the complaint process to excess.
>
> 3.The claimant's inclination to use the Employer's complaint process to what his follow employees considered to be an excessive degree was an underlying factor leading to the altercation in question.

In deciding whether this finding and conclusion dictate a result in this case, whether they should be disregarded as unnecessary to the decision, or stand somewhere in between, the Nasser decisions must be considered. But first an earlier case appears to have some comparability, at least in its inception. New Amsterdam Casualty Co. v. Collins, 289 S.W.2d 701 (Tex. Civ. App.-Galveston 1926, writ ref'd) began with an act in furtherance of the employment--R had freshly painted a boiler. An unknown employee smeared the paint. R accused three employees in sequence in a dressing room just after a shift change. Each denied it and R walked over to one, Collins, accused him again, and pulled "at the top of the latter's B. V. D.'s" saying that C took his underwear too. The court said, "R thus being

the aggressor, a fist fight" began. The real damage took place when R later obtained a pistol and shot C. Judgment for C was reversed and rendered. The court said in reference to R threat to C after C got the better part of the fist fight, "it may not be properly said that the threat arose out of or had its foundation in the employment." It further said that the smearing of the paint on the boiler furnished the basis for R to get mad "in general." Saying it was a "far cry" from that to a conclusion that R acted against C "as an employee or because of the employment," the court found as a matter of law against C. The phrase "underlying factor" in Conclusion of Law No. 3 may be compared to the determination that an employee got mad "in general" in Collins, *supra*. Being "mad" did not lead to a decision that injury arose out of the employment.

Security Insurance Co. v. Nasser, 704 S.W.2d 390 (Tex. App.-Houston [14th Dist.] 1985, rev'd 724 S.W.2d 17 (Tex. 1987), on remand 755 S.W.2d 186 (Tex. App.-Houston [14th Dist.] 1988, no writ), stated some broad language, especially in the opinion by the Supreme Court. It is helpful that on remand the court of appeals analyzed the case further. "The rationale is that Nasser was carrying out a duty of his employment--being friendly with a customer--and this was an important factor in the chain of events that led to the assault and injury." We do not equate "underlying factor" in Conclusion of Law No. 3 to "important factor" in Nasser, *supra*.

Even if the sequence of events (appellant's repeated reports to supervisors as "underlying" appellant's erroneous accusation against HS in regard to a cartoon) were not too far removed from each other in time and occurrence (*See* Collins, *supra*), the Nasser reference to "carrying out a duty" was not present here. No one testified that appellant had a duty to report teasing or name-calling. The supervisor did not say that appellant had a duty to report when he said he encouraged him to report.

Appellant also complained of Findings of Fact Nos. 6 and 7 and Conclusions of Law Nos. 4 and 5. Finding of Fact No. 6 essentially said that appellant's discovery of the cartoon triggered the altercation that resulted in injury and that HS did not alter or publish the cartoon. Finding of Fact No. 7 points out that appellant initiated the locker room conversation resulting in the altercation. Conclusion of Law No. 5 in part said, "any injury sustained as a result of the altercation in question arose out of the act of a third person intended to injure the Claimant because of personal reasons." With that conclusion, the hearing officer indicates that he believed HS, in whom he found credibility by making Finding of Fact No. 6, as to why he hit appellant. His decision supports an implied finding of fact that HS hit appellant because appellant came at him as an aggressor, while HS had his pants down, accusing him of altering a cartoon. With Conclusion of Law No. 5 determining the result, Conclusion of Law No. 4 (posting the cartoon precipitated the altercation) is not necessary to the decision and may be disregarded. Bittick v. Ward, 448 S.W.2d 174 (Tex. App.-Beaumont 1969, writ ref'd n.r.e.).

As in Texas Workers' Compensation Commission Appeal 91070 (Docket No. DA-00009-91-CC-1) decided December 19, 1991, the person who swung the first blow (in this

case, HS) said that it had nothing to do about work. A similar outcome to the case herein resulted from Texas Workers' Compensation Commission Appeal 91105 (Docket No. CC-91-89949-01-CC-CC41) decided January 21, 1992, in which one employee described another employee to other workers as "lazy" or in worse terms. The two also did not work together but were at the same site, and the blow struck by the "lazy" employee upon the talkative claimant was held not to be a compensable injury to claimant in that case. The case before us is one step further removed from background events in that the confronted employee, not the "lazy" or "crybaby" employee, struck the blow.

The hearing officer is the sole judge of weight and credibility of evidence. Article 8308-6.34(e). He could believe HS and determine that he did not alter the cartoon directed at appellant. In so doing, he was judging credibility and resolving conflicts and inconsistencies. Bullard v. Universal Underwriters Ins Co., 609 S.W.2d 621 (Tex. App.-Amarillo 1980, no writ). The conclusion of law that the injury arose out of the act of a third person for personal reasons and was not directed at appellant as an employee or because of the employment, coupled with the evidence of HS, support an implied finding that HS's blow was struck for personal reasons. Findings of fact and conclusions of law are not subject to the Administrative Procedure and Texas Register Act (APTRA), Article 8308-6.32 of the 1989 Act, and findings of fact have been implied when not made by the trial court. Burnett v. Motyka, 610 S.W.2d 735 (Tex 1980). The decision of the hearing officer is not so against the great weight and preponderance of the evidence as to be manifestly unjust and wrong.

The hearing officer did not abuse his discretion in denying benefits to appellant. We affirm.

_____
Joe Sebesta
Appeals Judge

CONCUR:

_____
Stark O. Sanders, Jr.
Chief Appeals Judge

_____
Philip F. O'Neill
Appeals Judge